

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MARVEL H. COSNER,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 1480-14 L
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	
)	

ORDER

This case is calendared for trial at the Court's June 15, 2015, Helena, Montana, trial session. On February 18, 2015, respondent filed a motion under Rule 53¹ to dismiss this case as moot. On March 16, 2015, petitioner filed his objection to respondent's motion.

On March 2, 2012, respondent issued to petitioner a notice of determination sustaining a proposed levy to collect petitioner's unpaid 2009 Federal income tax liability. On March 30, 2012, petitioner timely mailed to the Court a document that the Court later filed as his petition (petition). The Court received the petition on April 5, 2012. However, the petition was not docketed as such by the Court. On or about December 6, 2013, respondent served a levy on petitioner's employer to collect petitioner's unpaid 2009 tax liability. By July 1, 2014, respondent had fully collected by levy petitioner's unpaid tax liability for 2009.

On January 27, 2014, the Court filed petitioner's second petition in this case. On that same day the Court filed petitioner's motion under Rule 55 for injunctive relief from the December 6, 2013, levy. On March 14, 2014, respondent filed a notice of objection to petitioner's motion under Rule 55 and a motion under Rule 53 to dismiss the January 27, 2014, petition with respect to 2009. On July 22,

¹Unless otherwise indicated, section references are to the Internal Revenue Code for the relevant period, and Rule references are to the Tax Court Rules of Practice and Procedure.

2014, the Court issued an Order (1) ordering the Clerk of the Court to file nunc pro tunc petitioner's petition as of April 5, 2012, (and to recharacterize the January 27, 2014, petition as an amended petition); and (2) denying petitioner's Rule 55 motion without prejudice. On July 29, 2014, respondent released the December 6, 2013, levy. Respondent refunded to petitioner all payments that he received after petitioner's 2009 liability was fully paid.

On August 25, 2014, the Court filed petitioner's motion for reconsideration of the Court's July 22, 2014, Order. On October 6, 2014, the Court denied petitioner's motion on the grounds that "the Court has neither general refund jurisdiction in section 6330(d) cases such as this one, see Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006), nor specific refund jurisdiction under * * * section 6330(e)(1)".

In the present motion respondent moves to dismiss the case as moot because petitioner's 2009 Federal income tax liability is fully paid. Petitioner argues that this case is not moot because respondent's December 6, 2013, levy was unlawful pursuant to the Court's July 22, 2014, Order, in which the Court found that petitioner had timely petitioned the Court with respect to the March 2, 2012, notice of determination.

Petitioner's argument has much force. "A nunc pro tunc order retroactively corrects an original record which is erroneous through inadvertence or mistake." Turkoglu v. Commissioner, 36 T.C. 552, 554 (1961). The Court's July 22, 2014, Order found that petitioner had timely filed a petition with respect to the March 2, 2012, notice of determination and ordered that the petition be filed nunc pro tunc as of April 5, 2012. Accordingly, although he did not then know it, respondent was prohibited from serving the December 6, 2013, levy. See sec. 6330(e)(1). Pursuant to section 6330(e)(1), the Court may enjoin an unlawful levy notwithstanding the general prohibition on such injunctions under section 7421.

Greene-Thapedi v. Commissioner, 126 T.C. 1, which did not involve a premature levy, does not appear to preclude the Court from taking appropriate corrective action following a premature levy. In that case the Commissioner offset the taxpayer's 1999 overpayment against the taxpayer's 1992 liability, resulting in full payment of the 1992 liability. See id. at 4, 7. The Court held that it had no jurisdiction under section 6330(e)(1) because the tax liability was paid in full and the Commissioner no longer planned to execute the proposed levy. See id. at 7. In doing so, the Court reasoned that an offset pursuant to section 6402(a) does not constitute a levy action, see id. at 7-8 (citing Bullock v. Commissioner, T.C.

Memo. 2003-5, Boyd v. Commissioner, 124 T.C. 296, 300 (2005), aff'd, 451 F.3d 8 (1st Cir. 2006), and sec. 301.6330-1(g)(2), Q&A-G3, Proced. & Admin. Regs.).

The reasoning of Greene-Thapedi implies that the Court may order respondent to return the proceeds of an unlawful levy action even if the unlawful levy fully satisfied the taxpayer's theretofore unpaid tax liability. Indeed, in Greene-Thapedi the Court expressly observed that it had previously "exercised its inherent equitable powers to order the Commissioner to return to the taxpayer property that was improperly levied upon". Greene-Thapedi v. Commissioner, 126 T.C. at 9 n.13 (citing Chocallo v. Commissioner, T.C. Memo. 2004-152); see also Chocallo v. Commissioner, T.C. Memo. 2004-152, 87 T.C.M. (CCH) 1432, 1432 (2004). Moreover, any other conclusion would allow the Commissioner to moot any case brought under section 6330(e) by unlawfully executing a premature levy. We further note that the July 22, 2014, Order denied petitioner's motion for injunctive relief without prejudice.

This case leaves us with the question of whether we may order a return of the levy proceeds applied to 2009, either under section 6330(e)(1) or pursuant to our inherent authority. In addition, because petitioner timely petitioned this Court from the March 2, 2012, notice of determination, we must consider whether that determination must be sustained. We shall reserve any questions regarding the Court's authority to order a return of the levied funds until a later date.

It is therefore

ORDERED that respondent's Rule 53 motion, filed February 18, 2015, is denied.

This case remains calendared for trial at the Court's June 15, 2015, Helena, Montana, trial session.

**(Signed) L. Paige Marvel
Judge**

Dated: Washington, D.C.
June 5, 2015